

¹ The current record includes evidence received after the Office issued its November 12, 2008 decision. The Board's review of a case is limited to the evidence in the case record that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

FACTUAL HISTORY

Appellant, a 76-year-old former customs liquidating aid, has an accepted claim for dorsal capsular strain and dorsal tendinitis of the right wrist, which arose on March 25, 1980. She receives periodic compensation payments based on a June 30, 1987 wage-earning capacity determination. On or about February 5, 2007 appellant reported that she had not received her January 20, 2007 compensation payment. The check was for \$875.40 and covered the period December 24, 2006 through January 20, 2007. On February 27, 2007 the Office initiated the process for cancelling appellant's January 20, 2007 check. However, appellant had already cashed the check on February 26, 2007. Apparently, unaware that she had cashed her January 20, 2007 check; the Office issued her a replacement check on March 9, 2007. This check was also for \$875.40 and covered the same period December 24, 2006 through January 20, 2007. Appellant cashed the March 9, 2007 replacement check on March 28, 2007.

On October 10, 2008 the Office issued a preliminary determination that appellant received an overpayment of \$875.40 for the period December 24, 2006 through January 20, 2007. It found that she was at fault for creating the overpayment because she was aware or should have reasonably been aware that she cashed two checks for the same amount and coverage period, as indicated on the front of both the original and replacement check. Appellant was afforded 30 days to respond to the Office's preliminary determination. However, she did not respond within the allotted time frame.

On November 12, 2008 the Office issued a final overpayment decision. The findings with respect to fact and amount of overpayment, as well as fault were all consistent with the preliminary determination. It noted that appellant had not responded to its preliminary determination. In light of this fact, the Office imposed a repayment schedule of \$150.00 to be deducted every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³

ANALYSIS -- ISSUE 1

Appellant is represented by her daughter, who holds a durable general power of attorney dating back to December 20, 2006.⁴ In her request for an appeal, appellant's representative acknowledged that she had not responded to the Office's October 10, 2008 preliminary

² 5 U.S.C. § 8115(a) (2006); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

³ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁴ Appellant suffers from dementia in addition to other medical conditions, including her accepted employment injury.

determination. Appellant's representative also provided the Board with copies of several documents that she had previously submitted to the Office, albeit after the issuance of the November 12, 2008 final overpayment decision. The Board is precluded from considering this information for the first time on appeal.⁵

The fact and amount of the overpayment do not appear to be in dispute. Based on its 1987 wage-earning capacity determination, the Office issued appellant a check for \$875.40 on January 20, 2007. The front of the check indicated that payment was for compensation for the period December 24, 2006 to January 20, 2007. After being advised that appellant had not received her January 20, 2007 check, the Office placed a stop payment order on the missing check and issued a replacement check on March 9, 2007. The March 9, 2007 check was for the same amount and covered the same period as the January 20, 2007 check. Both checks were cashed. The January 20, 2007 check was negotiated on February 26, 2007 and the March 9, 2007 check was negotiated on March 28, 2007.⁶ Appellant is not entitled to be paid twice for the same period of wage loss. Consequently, the Board finds that she was overpaid \$875.40 for the period December 24, 2006 through January 20, 2007.

LEGAL PRECEDENT -- ISSUE 2

The Office is obliged to recover an overpayment unless adjustment or recovery of the overpayment would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.⁷ It may consider waiving an overpayment if the individual to whom it was made was not at fault in either accepting or creating the overpayment.⁸ Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments she receives from the Office are proper.⁹ A recipient will be found to be at fault with respect to creating an overpayment if the individual "[a]ccepted a payment which ... she knew or should have known to be incorrect."¹⁰ In making a determination of whether a claimant is at fault, a diagnosis of dementia (or an analogous condition) may be relevant because it may cast doubt on the claimant's mental capacity.

ANALYSIS -- ISSUE 2

Both the January 20, 2007 initial check and the March 9, 2007 replacement check indicated that the \$875.40 payment was for the period December 24, 2006 through January 20, 2007. The information provided on the checks, should have assured that appellant

⁵ *Supra* note 1.

⁶ A second Federal Reserve Bank stamp on both checks indicated that the payments were ultimately processed on March 1 and 30, 2007. However, the checks were initially processed at appellant's local bank on February 26 and March 28, 2007. This would account for why the Office's February 27, 2007 stop payment order was ineffective.

⁷ 5 U.S.C. § 8129(b) (2006); 20 C.F.R. §§ 10.433, 10.434, 10.436, 10.437.

⁸ 5 U.S.C. § 8129(b); 20 C.F.R. § 10.433(a).

⁹ 20 C.F.R. § 10.433(a).

¹⁰ *Id.* at § 10.433(a)(3).

knew or should have known that she was not entitled to the March 9, 2007 replacement check after she had already cashed the January 20, 2007 check.¹¹

However, the facts of this case strongly suggest that appellant suffers from dementia. Appellant's daughter holds a durable power of attorney obtained on or about December 20, 2006. This is also the period for which the Office found an overpayment: December 24, 2006 through January 20, 2007. The first check which appellant cashed was dated January 20, 2007 and the duplicate check, which was wrongly cashed, was dated March 9, 2007. Both acts occurred after the power of attorney was issued.¹² The Office cannot determine using "a reasonable person test" that appellant knew or should have known that she was not entitled to the second check without further developing the record concerning appellant's mental capacity.¹³ Therefore, the Board will set aside the Office's finding that appellant was at fault in receiving the overpayment and remand the claim for further development. After appropriate further development, the Office shall issue a new determination concerning fault.

ANALYSIS -- ISSUE 3

In light of the analysis of Issue 2, the Board finds Issue 3 to be moot.

CONCLUSION

Appellant received an overpayment of \$875.40 for the period December 24, 2006 through January 20, 2007. Because the Office did not develop whether appellant had the mental capacity to be found at fault, the Office decision on that issue is set aside and the claim is remanded for further development. The Board sets aside the Office order of repayment as moot.

¹¹ *Id.* at § 10.430; *Tammy Craven*, 57 ECAB 689, 691-92 (2006).

¹² The Office should determine, if it has not, whether appellant or another person actually negotiated the check and created the overpayment.

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.0200.5 (June 2009).

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2008 decision of the Office of Workers' Compensation Programs is affirmed with regard to fact and amount of overpayment and set aside and remanded on the issue of fault.

Issued: November 20, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board